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IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW IN THE WORKS OF THE UNITED NATIONS INTERNATIONAL LAW COMMISSION

*GENOWEFA GRABOWSKA**

INTRODUCTION

The custom and customary law enjoy a very special place both in the theory and practice of international law that can hardly be compared to their place in any other legal system. States and other subjects active in the international arena have, for ages, referred to old customs and well-established and commonly accepted conduct. Over centuries such experiences have accumulated and turned into catalogues of good practices which were broadly discussed by the then academics and created a solid foundation for the theory of international customary law.

Customary norms were particularly helpful in solving conflicts between states when the subject matter of the dispute was not regulated by any treaties, or existing treaties have not been precise or specific enough and which called for interpretation. Because of that the custom and customary law play a dual role in the international law system. The first is based on the assumption that custom and its contents, as shaped by the practice of the states, takes precedence over treaty provisions, which simply turn the custom into words - they codify it. The second, in turn focuses on the creative element of customary law norms which may change or even supersede stipulations of an agreement. Through interpretation of binding treaties, the international custom may shape a new wording of treaty stipulations and eventually, after certain conditions have been met, may even alter the contents of the treaty.

The above remarks lead to the commonly accepted conclusion that treaty norms and customary law norms are mutually complementary and in respect of form they should be treated equally, which means that they rank equally in terms of their importance. This is confirmed by the preambles of many international treaties which often provide that the norms of international

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customary law will regulate matters not regulated by treaty provisions. Even though a preamble is of a non-binding nature, as it simply describes the purpose of the treaty and its parties' intentions, the fact it refers to customary law plays the role of a safety valve to be activated in case there is a loophole identified in the treaty or treaty provisions cannot be clearly interpreted.

Discussions on the hierarchy of the sources of international law and the rank of the custom started, in fact, at the moment the Permanent Court of International Justice (PCIJ) was established and its Statute including the famous article 38 were adopted. Later on, this article, together with the whole statutes of the Permanent Court, was adopted by its legal successor - the International Court of Justice (ICJ) which operates within the United Nations structure.

At first glance article 38 of the ICJ Statute¹ is of a purely procedural nature as it provides for an exhaustive list of legal bases, which the Court needs to apply when deciding cases. It also stresses that when deciding cases the Court must rely on international law, by which it clearly confirms that legal basis for ICJ decisions listed therein belongs to the international law order. That is why the importance of article 38 of the ICJ Statute goes beyond the purely procedural aspect - it also has a substantive meaning and constitutes a commonly recognized basis for the catalogue of the sources of international law. This leads to the fundamental question, i.e. are the types of legal norms quoted in article 38 listed in the hierarchical order? Such an interpretation would imply that international custom listed as the second item should give precedence to international conventions which have been listed as the first item. Both academics² and practitioners applying the law to specific cases have been, for years, looking for the answer to this question.

For many years the interest in the custom and international customary law has focused on the analysis of the consequences of application of article 38. 1 b) of the ICJ Statutes. The reference to international custom as a proof of a "practice commonly accepted as law" has become a clear guideline on how to interpret "common practice" and when such common practice will be "accepted (recognized) as the law". Both academics and the courts, when relating to article 38, have examined the elements of the custom, looking for

¹ Article 38 ICJ:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

² See famous works of Professor Karol Wolfke: 'L'Elément subjectif dans la coutume international', in *Zeszyty Naukowe Uniwersytetu Wrocławskiego*, Seria A, No 27, *Prawo* (1960) 161-170; "Some Persistent Controversies Regarding Customary International Law", (1993) *Netherlands Yearbook of International Law* 24; *Custom in Present International Law*" (2nd edition 1993); 'Treaties and Custom: Aspects of Interrelation', in J Klabbers, R Lefeber (eds), *Essays on the Law of Treaties: A Collection of Essays In Honour of Bert Vierdag* (1998).

their confirmation primarily by reference to the conduct of the States, which were the main subjects of international law.

It was States who in their mutual relations referred to the custom, identified a common practice, confirmed its general application and finally accepted such practice as a customary norm and consequently as law. At the beginning of the 20th century, when the custom was introduced into the system of the sources of international law, such an approach was completely natural and obvious. It was because the only actors on the international scene were the States; international organizations acting as independent subjects were only to appear on a broader scale after the Second World War. Only several decades after the custom was identified as a source of law, did the international community decide to review its functioning in the new conditions. The, so called, organizational revolution of the second half of the 20th century led to creation of many new international organizations which became nearly equal to states in terms of importance. The United Nations and other specialized entities and regional organizations with strong integration functions have started to, more and more often, and, more and more effectively, participate in the creation of international law.

Their main bodies (organs) tend to draft international conventions, get statutory competencies to take law-making resolutions, issue recommendations and opinions and in some situations even apply sanctions vis-à-vis states (article 42 of the United Nations Charter). Alongside the previously known international tribunals, such as ICJ, other tribunals came into existence - they run proceedings, decide cases and prepare legal opinions for the States. When conducting this type of activity international organizations need to rely both on the treaty law in force and on the customary law which they co-created. This is confirmed by many rulings issued by courts, which apart from references to binding treaty law, had to identify customary norms as confirmed by the commonly accepted practice.

A more intensive participation of international organizations in the law-making process resulted in the development of various legal acts aimed at the States. As a result of the law-making resolutions of international organizations, the States became the addressees of documents requesting them to implement such rules into their internal legal systems. Since then it has become obvious that international law impacts and effects domestic laws of the States, not just through ratification of international treaties, but also through the law-making activities of internal bodies of international organizations. Due to the above, international organizations have become, together with States, significant subjects participating in the process of identification of customary law. This conclusion triggered a review of the ways in which customary norms were established and of the role that the custom played in the system of sources of the international law. The review was undertaken by the International Law Committee in 2012, when the subject of "Formation and evidence of customary international law" was included in its agenda and started being discussed³. The topic was approved, first by the Sixth Committee and then, by the whole General Assembly of the

³ See ILC, 'Note on the formation and evidence of customary international law' UN Doc A/CN.4/653.

United Nations which opened the way to further codification⁴. In 2013 the commission appointed Sir Michael Wood as the Special Rapporteur. The Rapporteur then submitted his first report supplemented by the memorandum of the International Law Commission Secretariat and the title of the report was "Elements in the previous work of the International Law Commission that could be particularly relevant to the topic"⁵. During further discussions the ILC changed the title of the codified issue, replacing the initial topic ("Formation and evidence of customary international law") with the following one, which better reflected the nature of the regulation: "Identification of customary international law". By doing so the Commission wanted to clarify doubts as to the meaning of the word "evidence", in particular when translated into official languages of the United Nations.

I. COMMISSION'S WORK

During initial discussions the members of the Commission unanimously agreed that the topic requires a two-element approach involving clarification of what a "general practice" is and what "acceptance of that practice as law" means. At the same time the Commission members realized, and often stressed, that the two elements may sometimes be "closely entangled" and that, therefore, the impact they have on the creation of a custom may depend on the circumstances.

The ILC has rightly assumed that formulating guidance on the topic will not be limited to the positions of the States but will also be guided by the

⁴ See documents of the ILC (2012-2016):

See ILC, 'Fourth report on identification of customary international law by Michael Wood, Special Rapporteur', Geneva, ILC Sixty-eighth session 2 May-10 June and 4 July-12 August 2016; Annex II Identification of customary international law: bibliography (document and books), UN doc A/CN.4/695/Add.1, 3. Basic documents:

1. ILC, 'Article 24 of the Status of the International Law Commission: Working Paper by Manley O. Hudson, Special Rapporteur', UN Doc A/CN.4/16 (1950).
2. ILC, 'London Statement of Principles Applicable to the Formation of General Customary International Law, with commentary: Resolution 16/2000 (Formation of General Customary International Law), adopted at the sixty-ninth Conference of the International Law Association, in London, on 29 July 2000'.
3. ILC, 'Formation and evidence of customary international law: Elements in the previous work of the International Law Commission that could be particularly relevant to the topic', Memorandum by the Secretariat, UN Doc A/CN.4/659 (2013).
4. ILC, 'First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur', UN Doc A/CN.4/663 (2013).
5. ILC, 'Second report on identification of customary international law by Michael Wood, Special Rapporteur' UN Doc A/CN.4/672 (2014).
6. ILC, 'Third report on identification of customary international law by Michael Wood, Special Rapporteur', UN Doc A/CN.4/682 (2015).
7. ILC, 'Fourth report on identification of customary international law by Michael Wood, Special Rapporteur', UN Doc A/CN.4/695 (2016).
8. ILC, 'The role of decisions of national courts in the case-law of international courts and tribunals of a universal character for the purpose of the determination of customary international law', Memorandum by the Secretariat, UN Doc A/CN.4/691 (2016).

See, <http://legal.un.org/ilc/reports/2016/>.

⁵ See UN Doc A/CN.4/659 (hereinafter: "*Secretariat memorandum*").

opinions of the courts and international tribunals, including primarily the International Court of Justice, and will also be influenced by the opinions of academics. It was also agreed that the result of the International Law Commission works should have a practical dimension, such as, for example, a set of conclusions with commentaries. Regarding the scope of its work, the ILC agree that it needs to examine the position of customary international law among other sources of international law and, primarily, its relationship to the treaties and general principles of law.

It was also recognized that special or regional customary law needs to be included, although it did not indicate clearly enough that the practice of international organizations should be examined equally profoundly as the practice of the States. The ILC assumed that the States' practice will be treated more favourably, which is evidenced, among other things, by the commission's willingness to examine bilateral custom. Such examination was really broad and covered not only the published collections of specific countries' practices, if available, and rulings of regional tribunals but, also rulings of the national high courts to the extent they referred to custom. Only during discussions of the Sixth Committee was it stated that the ILC needs to particularly focus on the practice of international organizations. In 2013 the ILC asked Member States of the United Nations "to provide information, by 31st of January 2014, on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation"⁶. The Commission was particularly interested in the information on customary law included in the Member States' opinions expressed before their legislatures, courts and international organizations and the rulings of domestic and regional courts. A similar invitation to participate in the discussion was sent by the ILC to all academic circles with a mention that the ILC will, by default, consider any and all publications and latest court rulings relating to the custom. The response rate was rather disappointing, given that only nine Member States submitted their views within the prescribed deadline⁷. The ILC continues working on codification of international custom as per previously adopted procedure and in the following order:

1) the Special Rapporteur prepares an initial report; 2) the report is discussed by Commission members, 3) the report, together with ILC comments, is provided to the Member States and other interested entities for discussion, 4) the comments are sent back to the ILC which, on this basis, formulates its final position on the topic, 5) after the final position is prepared regarding identification of customary international law, the Commission submits the document to the Sixth Committee of the General Assembly of the United Nations to be further processed and finally be sent for acceptance by the Member States.

⁶ UN Doc A/68/10: *Report of the International Law Commission on its Sixty-fifth session (6 May–7 June and 8 July–9 August 2013)* para 26.

⁷ The Kingdom of Belgium; the Republic of Botswana; Cuba; the Czech Republic; the Republic of El Salvador; the Federal Republic of Germany; Ireland; the Russian Federation; and the United Kingdom of Great Britain and Northern Ireland.

As mentioned above, the first ILC report was of an introductory nature; it presented materials for consultations and suggested the split and order of all the Commission's work on sub-topics.

In May 2014 Michael Wood (the Special Rapporteur) submitted to the International Law Commission the second report on identification of customary international law⁸ which, unlike the first report, touched upon fundamental substantive matters. The report is made up of four logically structured parts which relate to the issues material for the assessment of the position the customary international law. The regulation proposed therein takes the form of draft articles called draft conclusions. The first part (Introduction) presents the definition of the scope of the proposed regulation (article 1) and explains terminology (article 2). In the Rapporteur's opinion, the document should focus on the methodology for determining the existence and content of the rules of customary international law. At the same time he rightly stresses that the report's conclusions shall be without prejudice to the methodology concerning other sources of international law and questions relating to peremptory norms of international law (*ius cogens*).

Conclusion two flags the need for definition of an international organization for the purpose of the document and defines international customary law as follows: those rules of international law that derive from and reflect a general practice accepted as law. The above definition does not contain any novel elements and attributes the key role to common practice and acceptance as law.

The second part of the report contains draft articles indicating two key elements necessary for the existence of a norm of international customary law and its content. It also stresses the importance of the context including the surrounding circumstances in the context of assessment of whether or not there is a common practice accepted as law (article 3 and 4).

The third part of the report is called "A general practice" and it mainly refers to the practice of States and indicates its key role to the creation, or expression, of rules of customary international law (article 5). Quite importantly it defines the areas of States activities where such practice is expressed. Consequently the practice of States means their conduct when performing legislative, executive and judicial competencies or other functions (article 6). The catalogue of examples of such States' conduct is an open one because it is hard to formally limit it. The Rapporteur attempts to enumerate such types of conduct and indicate the areas of States' activities which best illustrate their practice.

No doubt this area of the regulation which puts together all types of States' conduct, based on which their practice may be inferred, constitutes an important contribution to the codification of international customary law (article 7 points 1-4). The list presented in the report is quite broad and apart from passive behaviours, it primarily includes all active examples of States'

⁸ ILC, 'Second report on identification of customary international law, by Michael Wood, special rapporteur, Geneva, ILC sixty-sixth session (5 May–6 June and 7 July–8 August 2014)', UN Doc A/CN.4/672.

expression, such as physical action of States⁹, acts of the executive branch¹⁰, diplomatic acts and correspondence¹¹, legislative acts¹², judgments of national courts¹³, official publications in the fields of international law, such as military manuals or instructions to diplomats, internal memoranda by State officials¹⁴, practice in connection with treaties¹⁵ and finally resolutions of organs of international organizations, such as the General Assembly of the United Nations and international conferences¹⁶. Sometimes State's practice may take a negative form, which happens when the State, instead of acting, remains passive (inaction as practice)¹⁷. The third report of 2015 elaborates further on this stating that: "inaction may also serve as evidence of acceptance as law, provided that the circumstances call for some reaction"¹⁸.

While it is hard to determine the States practice, it's even harder to determine the practice of international organizations. When discussing the issue, the report separates internal practice of an organization from its practice vis-à-vis States, indicating the separation between the practice of organization's organs and the practice of its bodies composed of States

⁹ Examples of such practice may include passage of ships in international waterways; passage over territory; impounding of fishing boats; granting of diplomatic asylum; battlefield or operational behaviour; or conducting atmospheric nuclear tests or deploying nuclear weapons. See ILC (n 8) 21-22 (point 41 (a)).

¹⁰ These may include executive orders and decrees, and other "administrative measures", as well as official statements by government such as declarations, proclamations, government statements before parliament, positions expressed by States before national or international courts and tribunals (including in *amicus curiae* briefs of States), and statements on the international plane. See ILC (n8) 22 (point 41 (b)).

¹¹ This includes protests against the practice of other States and other subjects of international law. Diplomatic

correspondence may take a variety of forms, including *notes verbales*, circular notes, third-party notes, and even 'non-papers'. See ILC (n 8) 22 (point 41 (c)).

¹² Competence derived from constitutions to draft bills, as "legislation is an important aspect of State practice". See ILC (n 8) 22-23 (point 41 (d)).

¹³ Judicial decisions and opinions of municipal courts may serve as State practice, and "are of value as evidence of that State's practice, even if they do not otherwise serve as evidence of customary international law" itself. See A/CN.4/672: Second report (n 8) 23-24 (point 41 (e)).

¹⁴ Such memoranda are, however, often not made public and "do not necessarily represent the view or policy of any government, and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment; it is not always easy to disentangle the personality elements from what were, after all, internal, private and confidential memoranda at the time they were made". See ILC (n 8) 24 (point 41 (g)).

¹⁵ Negotiating, concluding and entering into, ratifying and implementing bilateral or multilateral treaties (and putting forward objections and reservations to them) are another form of practice. See ILC (n 8) 24 (point 41 (h)).

¹⁶ This mainly concerns the practice of States in connection with the adoption of resolutions of organs of international organizations or at international conferences, namely, voting in favour or against them (or abstaining), and the explanations (if any) attached to such acts. See ILC (n 8) 25 (int 41 (i)).

¹⁷ Abstention from acting, also referred to as a "negative practice of States", may also count as practice. Inaction by States may be central to the development and ascertainment of rules of customary international law, in particular when it qualifies (or is perceived) as acquiescence. See A/CN.4/672: Second report (n 8) 27 (point 42).

¹⁸ See ILC, 'Third report on identification of customary international law by Michael Wood, special rapporteur', Geneva, ILC Sixty-seventh session, 4 May-5 June and 6 July-7 August 2015, UN Doc A/CN.4/682, 4 (point 26).

representatives. It separately addresses the specific practice of organizations, secretariats being there typical administrative units.

Finally the Rapporteur discusses the specific practice of organizations, such as the European Union, to which Member States have transferred exclusive competencies whereby such organizations may act on Member State's behalf¹⁹. The review of practice as an element of customary law is closed by the following two categories: 1) other than States subjects participating in international affairs and 2) courts and tribunals. The role of other non-State actors, such as non-governmental organizations and even individuals, ought to be acknowledged as contributing to the development of customary international law²⁰. Still in the third report of 2015 the ILC slightly differently addresses the participation of such subjects in the creation of practice influencing customary law. Its article 4 reads that: "conduct by other non-state actors is not practice for the purpose of formation or identification of customary international law"²¹.

While the decisions of international courts and tribunals as to the existence of customary international law and their formulation are not practice, such decisions serve an important role as "subsidiary means for the determination of rules of law"²².

Closing this part the ILC confirmed that for the creation of the customary norm practice, its necessary element "must be general, meaning that it must be sufficiently widespread and representative". However it does not need to be universal, which goes against the approach previously applied. Consequently, in the ILC's opinion, if practices applied by States or organizations are sufficiently general and consistent, it doesn't matter for how long they have been applied. Giving up on the duration criterion is in today's globalized world is perfectly understandable. With contemporary media the reaction (both positive and negative) to actions of other States may be very fast and may get to the interested party and the whole international community even on the same day. So, provided that the practice is sufficiently general and consistent, no particular duration is required. Therefore giving up on the duration criterion should be praised, as the real problem is not if a custom has taken more or less time to in its formation, but if it is really consistent, or if it is well-spread within International Community.

The fourth part of the report contains just two articles relating to the role of custom i.e. general practice being accepted as law. Article 10 stresses that without an identified and common practice being recognized no legal norm of international customary law will come into existence. The "*opinio iuris*" element, i.e. recognition as law, distinguishes customary law norms from custom or habit or use. The next article of the ILC draft lists various

¹⁹ See ILC (n 8) 28-30 (points 43-44).

²⁰ Individuals and nongovernmental organizations can indeed "play important roles in the promotion of international law and in its observance" (for example, by encouraging State practice through bringing international law claims in national courts), but their actions are not 'practice' for purposes of the formation or evidencing of customary international law. See ILC (n 8) 30 (point 45).

²¹ ILC (n 18) 69 (Annex, Draft conclusion 4).

²² K Skubiszewski, 'Elements of Custom and the Hague Court', (1971) 31 ZaöRV 810; the pronouncements of the ICJ in particular may carry great weight. See ILC (n 8) 30-31 (points 45-46).

forms of behaviour by relevant subjects, which may be the evidence of acceptance as law and stressing that such list is a non-exhaustive one.

The preparation by the Rapporteur and the submission to the ILC of the second report, including 11 draft articles which codified key issues of international customary law, created the right momentum and gave direction to further works of the Commission. The Rapporteur was asked to prepare the third report, which would elaborate on already discussed topics with particular emphasis on the place, role and meaning of treaties and resolutions of international organizations and conferences for identification of customary law. In addition it suggested that the following notions should be addressed in the next report: the “persistent objector” rule, special or regional customary international law, as well as bilateral custom²³. The Rapporteur adopted a very ambitious plan of further actions based on the assumption that the full report on the identification of customary law together with commentaries will be completed and presented to the ILC by the end of 2016.

In 2015, at the 67th session, the Commission had before it the third report of the Special Rapporteur²⁴, which contained additional paragraphs to three of the draft conclusions proposed in the second report and five new draft conclusions. Of particular importance are five new draft articles included in the third report and its part five (“Particular forms of practice and evidence”) and part six (“Exceptions to the general application of rules of customary international law”).

According to the mandate granted to him by ILC, the Rapporteur in the fifth part of the report referred to treaties (article 12), resolutions of international organizations and conferences (article 13), and judicial decisions and writings (article 14). For the first time, international law has regulated so specifically, mutual relationships and interdependencies between treaties and international customary law. The Rapporteur assumed that a treaty provision may reflect (or come to reflect) a rule of customary international law if it is established that the provision in question: 1. at the time when the treaty was concluded, codifies an existing rule of customary international law; 2. has led to the crystallization of an emerging rule of customary international law; 3. has generated a new rule of customary international law, by giving rise to a general practice accepted as law.

The above concise stipulation results from a long discussion strongly based on literature and supported with jurisprudence of international tribunals²⁵. Resolutions adopted by international organizations and conferences may, in some circumstances, be evidence of customary international law or contributed to its development (article 13). However, they cannot, in and of themselves, constitute it. Not surprisingly article 14 provides that judicial decisions and writings may serve as subsidiary means for the identification of rules of customary international law. One question that still remains unanswered is whether national court rulings should be treated the same way? The same question relates to the rulings issued by special courts

²³ See ILC (n 8) 63.

²⁴ See ILC (n 18).

²⁵ See ILC (n 18) 16-31 (points 31-44).

(ad hoc tribunals²⁶, the international criminal court, ICC), which administer justice only in respect of certain countries or subjects. The question regarding their contribution to the establishment of States practice or their impact on the identification of international custom remains open.

In the sixth part of the third report ("Exception to the general application of rules of customary international law") the Rapporteur formulated two exceptions, and described two situations where customary law either has a limited impact or doesn't apply at all. The first example described in article 15 refers to so-called particular custom, which is a rule of customary international law that may only be invoked by and against certain States. To determine the existence of a particular custom and its content, it is necessary to ascertain whether there is a general practice among the states concerned that is accepted by each of them as law (*opinio iuris*)²⁷. The second situation concerning so called "persistent objector" makes States that qualify as persistent objectors not eligible to be bound by the norms of international customary law (article 16). This relates to a State that has persistently objected to a new rule of customary international law while that rule was in the process of formation. Such a State is not bound by the rule for so long as it maintains its objection, provided that the objection is clear, consistent, permanent and unequivocal. The objection must be expressed at the stage of creation of the customary norm and, what's important, be continued when the rule has turned into a legally binding norm. A State must maintain its objection both persistently and consistently, the objection must be repeated as often as circumstances require, otherwise it will not be persistent, although it may be unrealistic to demand total consistency; the State may of course abandon its objection at any time²⁸.

The Rapporteur has made further progress on codification of international customary law conditional upon the reaction of ILC and States being consulted to the presented proposals. At the same time he stressed that he is ready to complete the works on the topic by the end of 2016. It turned out that the topic is not an easy one and what's more is controversial and requires further formal works. As a result the Commission had before it the fourth report of the Special Rapporteur and an addendum to the report providing a bibliography on the topic. The fourth report²⁹ contained, in particular, suggestions for the amendments of several draft conclusions in light of the comments by governments and others. It also addressed ways and means to make the evidence of customary international law more readily available. In addition the Commission finally requested the Secretariat to prepare a memorandum on the role of decisions of national courts and the case law of international courts and tribunals of a universal nature for the purpose of identification of customary international law.

The Commission considered the fourth report of the Special Rapporteur as well as the memorandum by the Secretariat at its official

²⁶ See [International Criminal Tribunal for the former Yugoslavia](#) (ICTY); [UN International Criminal Tribunal for Rwanda](#) (ICTR); UN Special Court for Sierra Leone (SCSL).

²⁷ See ILC (n 18) 54-58 (points 80-84).

²⁸ See ILC (n 18) 59-66 (points 85-95).

²⁹ See ILC, 'Fourth report on identification of customary international law by Michael Wood, special rapporteur', Geneva, ILC Sixty-eight session, 2 May-10 June and 4 July-12 August 2016, UN doc A/CN.4/695.

meeting between 19th and 24th May 2016 and decided to refer to the Drafting Committee the proposed amendments to the draft conclusions contained in the fourth report.

At its meeting, on 2 May 2016, the Commission decided to establish a special working group, with Mr. Marcelo Vázquez-Bermúdez as its chairman. Its main task was to assist the Special Rapporteur in the preparation of the draft commentaries to the draft conclusions to be adopted by the Commission. The working group held five meetings between 3 and 11 May 2016. As a result of its consideration, the Commission adopted, on first reading, a set of 16 draft conclusions on identification of customary international law, together with commentaries. In accordance with its Statute (articles 16-21), the ILC decided to transmit the draft conclusions, through the Secretary-General, to Governments. States and international organizations are invited to send to the Commission written comments on the draft conclusions and commentaries by 31 January 2018. So a second reading should also take place in 2018.

The Special Rapporteur has been also asked to prepare a draft bibliography on the topic. The current version is a part of the report published in its Annex II³⁰. It is worth mentioning that the Rapporteur has prepared, very carefully, an extensive bibliography regarding international customary law including not only references to documents, but also books, source materials, articles and even audiovisual lectures. Part of the bibliography, called *Customary international law in different fields of international law*, lists literature touching upon the overlap between international custom and human rights, humanitarian law, criminal law, law on the use of force, law of treaties, State immunity, diplomatic law, international responsibility, law of the sea, law of outer space, environmental law, law of international finance and international trade law. The undoubtedly well prepared bibliography helps immensely to properly arrange various sources relevant to codified laws regarding identification of international customary law.

FINAL REMARKS

The anticipated broad distribution of the full version of the document will most likely satisfy the needs of representatives of the States and international organizations, practitioners, critics, academics and students dealing with customary law. We can only look forward to becoming familiar with the end result of the ILC work.

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Wolfke K, *Custom in Present International Law*" (2nd edition 1993).

³⁰ Bibliography: see UN Doc A/CN.4/695/Add.1, 2-29. The draft bibliography will be circulated as an annex to the IV report. It will then be revised by 2018 to ensure that it is up-to-date, representative, and user-friendly. This will be done in the light of suggestions from members of the Commission, States, international organizations, and academic and other institutions.

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